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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 DONALD C HAYES,

12 v.
13 Plaintiff,

14 STATE OF WASHINGTON,
15 DEPARTMENT OF CORRECTIONS,
16 et al.,

17 Defendants.

18 CASE NO. 3:16-CV-05095-BHS-DWC

19 REPORT AND RECOMMENDATION

20 Noting Date: May 5, 2017

21 The District Court referred this action, filed pursuant to 42 U.S.C. § 1983, to United
22 States Magistrate Judge David W. Christel. Presently before the Court is Defendant Tuan
23 Duong's Motion for Judgment on the Pleadings and Defendants Sara Smith and Bernard
24 Warner's Motion for Summary Judgment. Dkt. 124, 127. After review of the Motions, the Court
recommends the Motions be denied as moot and Defendant Warner be dismissed from this
action.

25 In the Motions, Defendants Duong, Smith, and Warner seek dismissal of the claims
26 alleged against them in Plaintiff's Third Amended Complaint. *See* Dkt. 124, 127. On April 13,
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1 2017, Plaintiff filed a Fourth Amended Complaint. Dkt. 140. The Court screened the Fourth
2 Amended Complaint and directed all Defendants named in the Fourth Amended Complaint
3 (Department of Corrections, Elizabeth Suiter, Amy Reyes, Sara Smith, and Tuan Duong) to file a
4 response. *See* Dkt. 143.

5 An amended complaint supersedes the original complaint. *Ferdik v. Bonzelet*, 963 F.2d
6 1258, 1262 (9th Cir. 1992). The original complaint is “treated thereafter as non-existent.” *Loux v.*
7 *Rhay*, 375 F.2d 55, 57 (9th Cir. 1967) *overruled on other grounds by Lacey v. Maricopa County*,
8 693 F.3d 896 (9th Cir. 2012). The Motions attack the Third Amended Complaint, which is now
9 “non-existent.” *See* Dkt. 124, 127. Further, after review of the Fourth Amended Complaint,
10 Plaintiff has requested dismissal of Defendant Warner and included additional facts relating to
11 his claims against Defendants Duong and Smith. *See* Dkt. 33. Defendants Duong and Smith have
12 therefore been ordered to respond to the Fourth Amended Complaint.

13 Accordingly, the undersigned recommends the Motions (Dkt. 124, 127) be denied as
14 moot, but Defendants Duong and Smith be allowed to re-file dispositive motions based on the
15 allegations contained in the Fourth Amended Complaint. *See Bacon v. Reyes*, 2013 WL 3893254
16 (D. Nev. July 26, 2013) (denying motion for summary judgment as moot based on the filing of
17 an amended complaint); *Nelson v. City of Los Angeles*, 2015 WL 1931714, *22 (C.D. Cal. Apr.
18 28, 2015) (recommending summary judgment motions be denied without prejudice to their
19 reassertion after the plaintiff was given leave to amend because the motions for summary
20 judgment were based on the original complaint); *Farkas v. Gedney*, 2014 WL 5782788, *3 (D.
21 Nev. Nov. 6, 2014) (“[B]ecause granting [plaintiff’s] motion for leave to amend will alter the
22 scope of defendants’ now-filed motion for summary judgment, defendants’ motion for summary
23 judgment is denied without prejudice, subject to re-filing based on the scope of the soon-to-be
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1 amended complaint.”); *Bromfield v. McBurney*, 2008 WL 623322, *2 (W.D. Wash. March 3,
2 2008) (recommending the defendants’ motion to dismiss be denied as moot because an amended
3 complaint was filed, which operated as a complete substitute for the original complaint).

4 Additionally, the undersigned recommends Defendant Warner be dismissed from this
5 action because he is not named in the Fourth Amended Compliant and did plead a counterclaim
6 in this case. *See Fed. R. Civ. P. 41(a)* (once defendant has responded to the complaint, the action
7 may only be dismissed by stipulation of dismissal signed by all parties who have appeared or “by
8 court order, on terms that the court considers proper”).

9 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
10 Procedure, the parties shall have fourteen (14) days from service of this Report to file written
11 objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
12 objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time
13 limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on May 5,
14 2017, as noted in the caption.

15 Dated this 19th day of April, 2017.

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18 David W. Christel
19 United States Magistrate Judge
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